ORAL ARGUMENT NOT YET SCHEDULED

Case No. 14-1185

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Laura Sands,

Petitioner,

v.

National Labor Relations Board,

Respondent.

On Petition for Review of a Decision and Order of the National Labor Relations Board

RESPONSE TO EN BANC PETITION

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May 19, 2015

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), Petitioner Laura Sands certifies the following:

(A) ***Parties and Amici*:**

(1) The National Labor Relations Board ("NLRB" or "Board") is the Respondent in the case before this Court;

(2) Laura Sands was the Charging Party before the Board, and the Petitioner in this Court;

(3) United Food & Commercial Workers, Local 700 was the Respondent in the Board proceedings, and is the Intervenor before this Court.

(B) ***Rulings Under Review***: This case is before the Court on petition for review of the Board's Decision and Order in *United Food & Commercial Workers International Union, Local 700 (Kroger Limited Partnership)*, No. 25-CB-008896, 361 NLRB No. 39 (Sept. 10, 2014).

(C) ***Related Cases***: The instant case was not previously before this or any other court. There are no related cases. However, this case was previously the subject of a petition for mandamus before this Court in *In re Laura Sands*, No. 14-1007, after the Board failed to decide this case for more than six years. The Board only decided this case after this Court set an oral argument date to hear the mandamus petition.

Respectfully submitted,

/s/Aaron B. Solem
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TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES (CON'T)

Page(s)

TABLE OF AUTHORITIES (CON'T)

Page(s)

Statutes

Other Authorities

* Authorities upon which we primarily rely are denoted by an asterisk.

GLOSSARY OF ABBREVIATIONS

National Labor Relations Act	("NLRA" or "Act")
National Labor Relations Board	("NLRB" or "Board")
Unfair Labor Practice	("ULP")
United Food & Commercial Workers	("UFCW" or "Union")
Joint Appendix	("JA")

INTRODUCTION

En banc review occurs "only in the rarest of circumstances," for cases of "exceptional importance." *Bartlett ex rel. Neuman v. Bowen*, 824 F.2d 1240, 1244 (D.C. Cir. 1987) (Edwards J., concurring in denial of rehearing en banc). Not every important case warrants it. Indeed, this Court exercises its en banc review power sparingly and with restraint. *See* Douglas H. Ginsburg, *The Behavior of Federal Judges: A View from the D.C. Circuit*, 97 Judicature 109, 111 (2013) (footnotes omitted) ("The number of rehearings en banc [in the D.C. Circuit] averaged six per year in the 1980s, three in the 1990s, and less than one in the first decade since. In my view these declining numbers reflect in part the increasing level of mutual trust and respect among the judges"). Here, a partisan and divided National Labor Relations Board ("Board") asks this Court to overrule twenty years of uniform precedents protecting individual employees' rights to refrain from supporting political causes. *See United Food & Commercial Workers Int'l Union, Local 700 (Kroger Ltd. P'ship)*, 361 NLRB No. 39 (Sept. 10, 2014) (3-2 decision).

The Board's Petition for Hearing en banc is audacious given the background of this case.[1] It seeks to skip past a three-judge panel and proceed directly to an en banc Court for a case that was originally filed in June 2005 and languished

[1] It appears the Board's new *modus operandi* is to attempt to skirt three-judge panels in favor of immediate en banc hearings. The Board is attempting the same procedural gambit in the Fifth Circuit on an issue unrelated to this case. *See Murphy Oil USA, Inc. v. NLRB*, Fifth Circuit No. 14-60800.

undecided before the Board from April 2008 until September 2014. As a result of the Board's refusal to decide the validity of Laura Sands' unfair labor practice charge, Sands was left to petition this Court for a Writ of Mandamus in January 2014. *See In re Laura Sands*, No. 14-1007.[2] When this Court ordered a response to Sands' Mandamus Petition, the Board defended its unreasonable six-plus year delay by arguing that a substantial portion of its docket was "a higher priority" than this case. *See* Board Opposition to Mandamus in No. 14-1007, at 22-26 (filed May 27, 2014). The Board named sixteen cases and issues it considered a "higher priority," *id.*, not to mention the *hundreds* of other cases it decided while Sands was waiting, cases the Board considered—in its own words—"a higher priority" as well. *Id*. The Board issued its decision in this case only *after* this Court set November 25, 2014, as the date to hear oral argument on Sands' Mandamus Petition. (Order in No. 14-1007 filed Aug. 21, 2014).

Conceding that twenty years of this Court's precedents compel reversal of the decision below, a divided Board now has changed its tune. The ten-year old case of one former grocery clerk has been transformed from one of low agency priority to one the Board insists must be heard by this entire Court, for the sole

[2] Demonstrating a surprising lack of candor, the Board's Petition and the accompanying Certificate as to Parties, Rulings, and Related Cases fail to mention Sands' Mandamus Petition, No. 14-1007, as a related or relevant case.

purpose of overruling two D.C. Circuit cases[3] that have stood as a bulwark to protect nonunion employees' right to refrain from supporting political causes they abhor.

The Board proffers only one reason why this case, among all others, warrants en banc review: it claims the two decisions of this Court "significantly interfere" with the Board's ability to administer the National Labor Relations Act ("NLRA"). Board Pet., at 13. This argument proves too much because it follows, logically, that every case in which this Court reverses a Board decision would automatically warrant en banc consideration. Moreover, there is no interference here because the Board does not exercise exclusive or even primary jurisdiction over the federal court-created duty of fair representation. There is no cause for en banc review.

FACTUAL AND LEGAL BACKGROUND

In December 2004, Laura Sands, then a seventeen-year old, began working as a grocery clerk at a Kroger store in Indiana. (JA 48). United Food & Commercial Workers, Local 700 ("UFCW" or "Union") negotiated with Kroger a clause requiring union membership and payment of dues as a condition of employment. Shortly after her hire, the UFCW sent Sands two letters, each containing a membership application and a dues deduction card. (JA 15-21). The

[3] *Abrams v. Commc'ns Workers of Am.*, 59 F.3d 1373 (D.C. Cir. 1995), and *Penrod v. NLRB*, 203 F.3d 41 (D.C. Cir. 2000).

letters made no mention of Sands' right to remain a nonmember and pay only reduced agency fees—information commonly known as a "*Beck* notice." Instead, the Union's *Beck* notice was printed on the back of the membership application in small, hard-to-read type. (JA 18). The notice was entirely silent as to the amount or percentage reduction of the dues Sands would be required to pay if she chose to exercise her option to remain a nonmember and become a "*Beck* objector." Lulled by this deficient notice, Sands signed a union card, became a UFCW member, and began having full union dues deducted from her salary. When she later learned of her actual rights to retain nonmembership and refrain from paying for the UFCW's political causes, Sands promptly resigned from the Union and became a *Beck* objector. (JA 22). Sands' resignation and objection letter stated she had been "deliberately misled" by the Union's deficient notice. *Id.* The UFCW obviously had the reduced fee information readily-available, as it was sent to Sands the very next day after it received her letter. (JA 22-36). Sands then filed this ULP case. [4]

In *Communication Workers of America v. Beck*, 487 U.S. 735 (1988), the Supreme Court held that NLRA Section 8(a)(3), 29 U.S.C. § 158 (a)(3), allows objecting nonmembers to refrain from paying any portion of a union's dues that are spent on political and ideological activities unrelated to collective bargaining,

[4] The Union argues Sands lacks standing to bring this appeal. *See* Union Merits Br. 4-6. The Board does not join in this argument, *see* Board Merits Br. 1-2, and for good reason, because Sands has standing. *See* Sands Merits Br. 6-11. Regardless, either a three-judge panel or en banc Court will have to decide this issue.

contract administration, or grievance adjustment. In *Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292 (1986), the Court established procedural guidelines to protect nonmembers' political autonomy, while permitting unions to collect the portion of the dues spent on collective bargaining. Of most importance here, for nonmembers faced with the choice either to pay full dues or reduced financial core fees, the Supreme Court held that "[b]asic considerations of fairness . . . dictate that the *potential objectors* be given sufficient information to gauge the propriety of the union's fee. Leaving the nonunion employees in the dark about the source of the figure for the agency fee-and requiring them to object in order to receive information—does not adequately protect" their rights. *Id*. at 306 (emphasis added).

In *California Saw & Knife Works*, 320 NLRB 224, 332-33 (1995), the Board recognized that *Hudson* provides a touchstone for determining the adequacy of a union's notice to nonmember employees. Although *Hudson* involved public sector nonmember employees, the Board cited this Court's *Abrams* decision and recognized that *Hudson* was premised on "basic considerations of fairness" that also apply to a union's statutory obligations under the duty of fair representation.

> We are convinced that the Court's explicit articulation of this broader rationale demonstrates that the Court's concern that nonunion employees not be left "in the dark about the source of their agency fee" was not entirely limited to the constitutional context, but is also a relevant concern in the context of a private sector union's duty of fair representation. *See Abrams v. Communications Workers*, 59 F.3d at 1379 n.7.

Id. at 233 (footnotes omitted).

California Saw created a set of procedures purportedly meant to implement *Beck* and protect nonmembers' right not to fund political and ideological activities. The Board outlined a three-stage process: (1) the initial notice stage, requiring a notice to potential objectors to inform them of their choice to be nonmembers and objectors; (2) the objection stage, at which an employee who made an objection receives more detailed financial information from the union explaining how it arrived at its chargeable amount; and (3) the challenge stage, for employees who dispute the union's calculation of its chargeable expenses. Thus, at the first stage a nonmember who has not yet chosen whether to join the union or object and pay the reduced fee is a "potential objector," as that term was used in *Hudson*. *See, e.g.*, *Carlson v. United Academics*, 265 F.3d 778, 782 (9th Cir. 2001).

Today, and in steadfast opposition to the Supreme Court and twenty years of this Court's precedents, a divided Board wants to mandate that potential objectors at the *California Saw* "first stage" must make their choice "in the dark," and only discover the amount of the reduction they will receive later, at "stage two." The Board's position conflicts not only with the duty of fair representation standard as established by this Court in *Abrams*, 59 F.3d 1373, and *Penrod v. NLRB*, 203 F.3d 41, but every other federal court decision to confront this issue in applying *Hudson*. *See infra*, pp.11-12.

ARGUMENT

I. THE FEDERAL COURTS CREATED AND OWN THE DUTY OF FAIR REPRESENTATION, AND THIS COURT'S DECISIONS DO NOT INTERFERE WITH THE BOARD'S ABILITY TO ADMINISTER THE NLRA.

According to the Board, this case warrants en banc review because *Penrod* and *Abrams* undermine the Board's "traditional role" in determining national labor policy. This Court's decisions do no such thing.

First, the federal courts, not the Board, created and exercise primary jurisdiction over the duty of fair representation. *Steele v. Louisville & Nashville R.R.*, 323 U.S. 192 (1944). Only belatedly did the Board deign to interpret a breach of the duty of fair representation as an equivalent unfair labor practice. *Vaca v. Sipes*, 386 U.S. 171, 177-79 (1967). Federal courts thus remain the prime expositor of the duty of fair representation, and the Board has no claim to exclusivity or special expertise in that area. As the Supreme Court explained in *Beck*, the duty of fair representation allows the federal courts to serve as the ultimate guardian of employees' individual rights against the unlawful extraction of agency fees "beyond those necessary to finance collective-bargaining activities." *Beck*, 487 U.S. at 742-44; *see Vaca*, 386 U.S. at 181-82. Contrary to what the Board claims in its Petition, it has never been the authoritative voice on matters of the duty of fair representation, so a differing federal court decision cannot upend its administration of the NLRA. The Supreme Court said it best in *Vaca*:

> [T]he need to avoid conflicting rules of substantive law in the labor relations area and the desirability of leaving the development of such rules to the administrative agency created by Congress for that purpose—*is not applicable to cases involving alleged breaches of the union's duty of fair representation*. The doctrine was judicially developed in *Steele* and its progeny, and suits alleging breach of the duty remained judicially cognizable long after the NLRB was given unfair labor practice jurisdiction over union activities . . . [I]t can be doubted whether the Board brings substantially greater expertise to bear on these problems than do the courts, which have been engaged in this type of review since the *Steele* decision.

386 U.S. at 180-81 (emphasis added) (footnotes omitted).

In fact, most of the key cases involving the duty of fair representation and compulsory union dues originated with individual plaintiffs in federal court lawsuits, and did not involve unfair labor practice charges before the Board. See *Abrams*; *Beck*; *Miller v. Air Line Pilots Ass'n*, 108 F.3d 1415 (D.C. Cir. 1997), *aff'd*, 523 U.S. 866 (1998); *Ellis v. BRAC*, 466 U.S. 435 (1984); *Marquez v. Screen Actors Guild, Inc.*, 525 U.S. 33 (1998). If *Abrams* can be said to negatively affect the Board's administration of the NLRA that must also be the case regarding *Beck*, *Marquez*, and *Miller*.

Second, because the Board has no primary or exclusive jurisdiction over the duty of fair representation it cannot unilaterally settle national labor policy regarding compulsory union dues. *Beck*, 487 U.S. at 742-45. Thus, even if this Court were to authorize the Board to reject *Abrams* and *Penrod*, it will not have settled a national debate, because nonmember employees wronged by misleading

union disclosure will eschew the Board and proceed to federal court under the duty of fair representation. Rather than create a national labor policy, the Board's refusal to adhere to *Abrams* and *Penrod* will result in more duty of fair representation litigation entering the federal courts, and increase the level of balkanization of labor policy.

Third, the Board's claim that this Court's decisions hamper its ability to administer labor law is unfounded. If *Abrams* and *Penrod* hamper the Board's ability to administer the NLRA, then so does every other case where this Court overturns or refuses to enforce a Board decision. *See, e.g., Ozark Auto. Distrib., Inc. v. NLRB*, 779 F.3d 576 (D.C. Cir 2015) (overturning Board order enforcing subpoena against employer); *World Color USA Corp. v. NLRB*, 776 F.3d 17 (D.C. Cir. 2015) (overturning Board order regarding employer's union insignia policy); *Tenneco Auto., Inc. v. NLRB*, 716 F.3d 640 (D.C. Cir. 2013) (overturning Board order declaring employer's withdrawal of recognition unlawful); *National Ass'n of Mfrs. v. NLRB*, 717 F.3d 947 (D.C. Cir. 2013) (striking down NLRB regulation requiring employers to post informational notices). The Board's claim that this case is "exceptionally important" because *Abrams* and *Penrod* undermine its authority "reduces the 'exceptional importance' test to a self-serving and result-oriented criterion." *Bartlett ex rel. Neuman v. Bowen*, 824 F.2d 1240, 1242 (D.C.

Cir. 1987) (Edwards, J., concurring).[5] In short, if this case is worthy of en banc review, than every Board reversal by this Court should also be granted such review.

II. *PENROD* AND *ABRAMS* WERE CORRECTLY DECIDED AND THE BOARD'S HAIR-SPLITTING DISTINCTIONS CONTRAVENE EVERY *HUDSON* DECISION BY THE FEDERAL COURTS.

The crux of the Board's argument on the merits is that *Hudson* "neither addressed nor decided the rights of employees who are receiving their initial union-security-clause notice." Board Pet. at 1-2. The Board contends *Hudson* only grants rights to employees who *actually* object to the collection of dues and fees, not "potential objectors." Yet, the Board's Petition does not cite a single court that has limited *Hudson*'s disclosure mandate only to those "already objecting," as no such cases exist. The Board's cribbed *Hudson* decision not only stands alone, but stands against a tidal wave of uniform decisions from the Supreme Court and multiple circuits.

It is long-settled law that *Hudson* requires a union to provide adequate notice to employees who have never registered an objection to paying for a union's

[5] The Board also tries to claim *Penrod* is inconsistent with *Thomas v. NLRB*, 213 F.3d 651 (D.C. Cir. 2000). Board Pet. at 12. But the Board ignores that *Thomas* applied *Penrod*, and remanded the case to the Board to determine the proper remedy for the petitioner. See *Thomas*, 213 F.3d at 655-56. The Board cannot manufacture a conflict where none exists. *Thomas*, which agrees with *Penrod* on this question, changes nothing. What has changed is that a Board that was once willing to apply *Penrod* on remand has now become politically divided.

political expenditures. "The purpose of the *Hudson* notice is to provide employees with adequate information so that they may decide *whether* to object or to challenge the Union's calculation." *Cummings v. Connell*, 316 F.3d 886, 895 (9th Cir. 2003) (citation omitted) (emphasis added); *see also Tierney v. City of Toledo*, 824 F.2d 1497, 1503 (6th Cir. 1987) ("This information must also be disclosed to all non-members whether or not they have yet objected to the union's ideological expenditures.") (footnote omitted); *Damiano v. Matish*, 830 F.2d 1363, 1370 (6th Cir. 1987) (the notice must be provided to all potential objectors in advance, and it "must inform the non-union employee as to the amount of the service fee, as well as the method by which that fee was calculated"); *Otto v. Penn. State Educ. Ass'n*, 330 F.3d 125, 128 (3d Cir. 2003) ("without the *Hudson* notice, a non-member would lack a basis for deciding whether to object to a fair-share fee calculation.") (citing *Penrod*); *Locke v. Karass*, 382 F. Supp. 2d 181, 187 (D. Me. 2005), *aff'd*, 498 F.3d 49 (1st Cir. 2007), *aff'd*, 555 U.S. 207 (2009) (noting *Hudson* held "the union should have provided details of the fee calculation to all nonmembers regardless of whether they filed an objection to the fees"); *Liegmann v. Cal. Teachers Ass'n*, 395 F. Supp. 2d 922, 928 (N.D. Cal. 2005) (rejecting claim that *Hudson* notice must be given to *actual union members*, stating "the Supreme Court's reference to 'potential objectors' . . . simply refers to nonmembers *who could be objectors*") (emphasis added). Indeed, the Board stands alone in claiming

that *Hudson*'s disclosure requirements do not apply to all "potential objectors," *i.e.*, employees who must choose between joining the union and paying full dues versus not joining and paying reduced financial core fees.

The Supreme Court's recent decision in *Knox v. SEIU, Local 1000*, 132 S. Ct. 2277 (2012), further decimates the Board's artificial limitation of *Hudson* to those "already objecting." In *Knox*, the Court considered whether a union's mid-year special assessment, without a new *Hudson* notice, violated the First Amendment. The plaintiffs in *Knox* included both nonmembers who did not previously object to paying full dues—"potential objectors"— and nonmembers who were actual objectors. The Court held both groups of employees were entitled to a second *Hudson* notice regarding the mid-year assessment, to allow them a new opportunity to object. The Court noted: "*Hudson* rests on the principle that nonmembers should not be required to fund a union's political and ideological projects unless they choose to do so after having 'a fair opportunity' to assess the impact of paying for nonchargeable union activities." *Id.* at 2291 (citations omitted). Even the dissenters in *Knox* understood *Hudson* affords at least an initial notice to *all* nonmembers, not just objectors, who may or may not thereafter object to paying full dues. *See id.* at 2302-2306 (Breyer, J., dissenting).

Given that every court to address *Hudson*—including the Supreme Court in *Knox*—has found that an adequate notice must be provided to all nonmembers, the

Board has no basis for insisting this Court was wrong in *Abrams* and *Penrod*. *See Miller*, 108 F.3d at 1420 ("[w]e see no reason why th[e] statutory duty of fair representation owed to nonmember agency shop employees carries any fewer procedural obligations than does a constitutional duty"). The Board's improper confinement of *Hudson* would upend years of settled law.

Even putting aside the uniform federal and Supreme Court precedent the Board ignores, its nullification of *Hudson* is wrong on its own terms. *Hudson* understood the distinction between "potential objectors" and actual objectors seeking to challenge the calculation of a union's fee. Until the later decision in *Knox* questioned the validity of the objection requirement, 132 S. Ct. at 2290, the Supreme Court long adhered to the notion that even nonunion members must pay full union dues unless they object, because "dissent is not to be presumed—it must affirmatively be made known to the union by the dissenting employee." *Machinists v. Street*, 367 U.S. 740, 774 (1961); *see Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 238 (1977) (quoting *Street* in denying injunction against union from collecting full dues from all nonmembers for nongermane activities); *Railway Clerks v. Allen*, 373 U.S. 113, 118-19 (1963). The Board overlooks footnote 16 of *Hudson*, which specifically cites *Street*, *Abood*, and *Allen*'s agreement that dissent is not to be presumed—all three cases dealt with employees who had to choose to "opt-out" before being allowed to pay reduced fees. *Hudson*, 475 U.S. at 306 n.16.

Hudson differentiates "objectors" from "potential objectors" precisely because those potential objectors "must be given sufficient information to gauge the propriety of the union's fee." *Id.* at 306.[6]

Lastly, even assuming there is an open question concerning *Hudson*'s meaning, and even assuming deference is applied to the Board's constricted views, the Board's decision is not supported by substantial evidence. The Board rejects *Penrod* and *Abrams* because it believes that "small unions" will be burdened by any initial disclosure requirement. Board Pet. at 13-14; 361 NLRB No. 39 at 8. This case, however, does not deal with a small union; it deals with a large international union with over $208 million in total assets.[7] The UFCW had the percentage reduction information required by *Beck* and *Hudson* at its fingertips, but made a conscious decision to keep Sands "in the dark" regarding the percentage of the fee when it sent the initial notice. (*Compare* JA 15-21 *with* JA 22-36). Indeed, the UFCW provided Sands with audited information about the

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[6] The Supreme Court also understood the difference between an initial objection to the fee and a subsequent challenge to the amount of the fee. *Hudson* later refers to "challenges" as distinct from "objections": "We hold today that the constitutional requirements for the Union's collection of agency fees include an adequate explanation of the basis for the fee, a reasonably prompt opportunity *to challenge* the amount of the fee before an impartial decision maker, and an escrow for the amounts reasonably in dispute while such challenges are pending." *Hudson*, 475 U.S. at 310 (emphasis added).

[7] Department of Lab., UCFW, LM-2 report (last visited on May 12, 2015); http://kcerds.dol-esa.gov/query/orgReport.do?rptId=547573&rptForm=LM2Form

amount of its reduced fee calculation only one day after receiving her objection letter. (JA 22-36). Whatever the merits of the Board's contention that *Penrod* and *Abrams* burden small unions, it makes no attempt to argue that *this* Union is burdened. The Board's logic is that if a prophylactic disclosure rule burdens a small union, the rule cannot apply to a large union. This is illogical, since large unions like the UFCW will already have numerous *Beck* objectors, will already have performed the required financial audits, and therefore can easily comply with this initial notice requirement. The Board never fills in the gap in its logic by showing how *Penrod* burdens *this* Union. If there were a case to overrule *Penrod*, this would not be it.

CONCLUSION

The Board's Petition for Hearing En Banc should be denied.

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Date: May 19, 2015

CERTIFICATE OF SERVICE

I hereby certify that on May 19, 2015, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system.

I further certify that the foregoing document was served on all parties or their counsel of record through the appellate CM/ECF system as they are registered users.

Date: May 19, 2015

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